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IN THE

Supreme Court of the United States

October Term, 1962

No. 124

In the Matter

of

SWAN-FINCH OIL CORPORATION, KETA GAS AND OIL COMPANY, SWAN-FINCH PETRO CHEMICAL CORPORATION,

Debtors.

PETER JAKOBSON,

Petitioner,

against

GEORGE C. LEVIN and JAMES V. HALLISEY, Trustees of SWAN-FINCH OIL CORPORATION, KETA GAS AND OIL COMPANY and SWAN FINCH PETRO CHEMICAL CORPORATION,

Respondents.

BRIEF AND APPENDIX FOR RESPONDENTS

GEORGE C. LEVIN,
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745 Fifth Avenue,
New York 22, N. Y.

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IN THE

Supreme Court of the United States

October Term, 1962

No. 1092

In the Matter

of

SWAN-FINCH OIL CORPORATION, KETA GAS AND OIL COMPANY, SWAN FINCH PETRO CHEMICAL CORPORATION,

Debtors.

PETER JAKOBSON,

Petitioner,

against

GEORGE C. LEVIN and JAMES V. HALLISEY, Trustees of SWAN-FINCH OIL CORPORATION, KETA GAS AND OIL COMPANY and SWAN FINCH PETRO CHEMICAL CORPORATION,

Respondents.

BRIEF FOR RESPONDENTS

Statement

This is the third time the Birrell affair has come before this Court.* No reason yet appears for further consideration of this matter by this tribunal. Review of this application should be denied because it presents no federal question, no substantial injustice and no novel or important

* In the *Matter of the Petition of Lowell M. Birrell* for a writ of prohibition and mandamus 355 U. S. 951, 2 L. Ed. 2d 528, 78 S. Ct. 546 (1958); *Doeskin Products, Inc. v. William D. Pettit, et al.*, certiorari denied, 362 U. S. 910, 80 S. Ct. 660, 4 L. Ed. 618; *Lowell M. Birrell Disbarment Proceedings*, 368 U. S. 917, 7 L. Ed. 2d 133, 82 S. Ct. 245 (1961).

ruling of law. The attempted claim of conflict among the circuits is a spurious issue urged here for the first time and, if valid, has been effectively waived below. This case continues to present an affront and a challenge to the administration of justice. Herbert A. Birrell, the brother, like the infamous Lowell, has withdrawn to Canada, while Lowell continues to enjoy the hospitality of Rio de Janeiro where neither Brazil nor our own government seems capable of dislodging him.

The Record

Petitioner's application is presented on an incomplete record and omits papers considered by the Court of Appeals. These omitted documents are partially presented here by respondents in the appendix. (p. 1a). The Court's attention is particularly directed to the motion to dismiss the appeal in the Circuit Court (Appendix, pp. 1a-19a) to which the petition makes no references whatsoever.

The Essential Facts

The facts here involved are fully discussed in three excellently written opinions by District Judge Edmund L. Palmieri. One is reproduced in petitioner's appendix, pp. 16-21 (212 F. Supp. 638), and one subsequent opinion appearing in respondents' appendix (pp. 21a-30a).

For a full statement of the facts which will not be here repeated there is included in the appendix (pp. 21a-30a) Judge Palmieri's summary of what has thus far transpired.

This Court Should Not Interfere With the Actions of the Court Below

Almost every judge of the second circuit has dealt with the Birrell affairs. In *Ferguson* v. *Tabah* (2 Cir. 1961), 288 F. 2d 665, Circuit Judge Smith discussing "The misguided financial genius of Mr. Birrell" has summarized

"the scope of the judicial business created by Birrell" with a prophetic comment: "This sampling of cases by no means exhausts all of the Birrell inspired litigation and the complete unraveling of his affairs will undoubtedly spawn even more cases in the future" citing cases.[1]

In that case the Court of Appeals affirmed Judge Palmieri's putting Doeskin Products, Inc. in charge of Court-appointed fiscal agents, a virtual receivership.

In *Ferguson* v. *Bucks County Farms Inc.*, 280 F. 2d 739 the third circuit (1961) approved the appointment of a receivership of Birrell's property.

For the glaring facts here present the Court is referred to District Judge Palmieri's opinion, particularly the latest one summarizing the facts (Appendix, pp. 21a-30a).

Motion to Dismiss Appeal

Petitioner studiously avoids reference to this motion which has not been brought to the attention of the Court. The respondents are therefore compelled to include the papers in the annexed appendix (pp. 1a-19a).

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[1] "The misguided financial genius of Mr. Birrell has received nationwide periodical treatment in the November, 1959 issue of Fortune and in a July, 1959 issue of Life.

A representation of the scope of the judicial business created by Birrell can be found in Birnbaum v. Birrell, D. C. S. D. N. Y. 1955, 17 F. R. D. 409; Saltzman v. Birrell, D. C. S. D. N. Y. 1957, 156 F. Supp. 538; Claude Neon, Inc. v. Birrell, D. C. S. D. N. Y. 1959, 177 F. Supp. 706; Pettit v. Doeskin Products, Inc., 2 Cir., 1959, 270 F. 2d 95, rehearing denied 2 Cir., 270 F. 2d 699, certiorari denied 362 U. S. 910, 80 S. Ct. 660, 4 L. Ed. 2d 618; Grubbs v. Pettit, 2 Cir. 1960, 282 F. 2d 557; Ings v. Ferguson, 2 Cir., 1960, 282 F. 2d 149; Ferguson v. Bartels Brewing Co., 2 Cir., 1961, 284 F. 2d 855; Weinberger v. Bradley, Sup., 210 N. Y. S. 2d 658. This sampling of cases by no means exhausts all of the Birrell inspired litigation and the complete unraveling of his affairs will undoubtedly spawn even more cases in the future."

The Trustees contended below that petitioner Jakobson was a stooge acting for Herbert Birrell who had fled to Canada; that Jakobson was Herbert's agent discharged by the receiver and that he had no standing to appeal or to attack the receivership order (pp. 3a, 9a, 10a).

Petitioner Is Not a Real Party in Interest

The building in question stands in the name of Birrell's brother Herbert.

Lowell has fled to Rio.

Herbert gave up his apartment and fled to Canada leaving petitioner Jakobson in charge of the building as agent under a five year lease with a clause under which he can be discharged on 60 days' notice (p. 7a).

The receiver discharged him effective January 31st, 1963 (p. 6a).

Herbert remains in Canada with $500,000 and does not appeal (p. 9a).

His stooge and dummy does.

Petitioner paid no money for a lease to a 14-story apartment building at 1050 Park Avenue (87th Street), New York City (p. 5a).

Subsequent to the appointment of a receiver and on February 14, 1963 Herbert Birrell from his Canadian refuge *transferred* the building to Empire Associates, Inc., giving as its address his counsel's office (Appendix, pp. 31a-33a).

Climaxing this effrontery *petitioner* proceeded to Canada and contracted to buy the building in the name of

Peter Jakobson Corporation

on February 22, 1963 (pp. 34a, 23a).

How brazen can you get and call yourself a "bona fide obligee" (p. 8)?

The Theory of the Action Against Herbert Birrell

Petitioner argues (p. 14): "The plenary action was commenced in 1962—11 years after the alleged transfer."

The Trustees contend Lowell Birrell has been a known thief since 1947. See allegations of complaint.[1] Anticipating judgments he kept no property in his own name. A long-drawn-out stockholder suit culminated in a personal judgment against Lowell Birrell for $3,256,639.40 entered on February 27, 1958. See *Claude Neon, Inc.* v. *Birrell*, 177 F. Supp. 706, 707 (D. C. S. D. N. Y. 1959).

In 1947 stockholders were clamoring for a receivership of Doeskin Products, Inc. (then Sanapak. See 85 N. Y. Supp. (2d) 462, 1947).

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[1] The complaint alleges:

"15. That prior, during and subsequent to the aforesaid period of time, that is from 1944 to 1957, Lowell embarked upon a career of obtaining control of various corporations and stealing their assets and that from 1944 until the present, Lowell was substantially indebted to various parties and intended to engage in speculative and hazardous enterprises in connection with which he intended to incur further indebtedness as part of his illegal ventures.

16. That in the course of Lowell's infamous career, he has used his brother Herbert many times as a nominee and dummy to hold securities in Herbert's name in order that Lowell's creditors could not attack them.

17. That on or about February 16, 1951 Lowell, intending to secrete his assets, transferred the said apartment house by deed from Ruby to Herbert; that at the time of the said transfer Lowell was a defendant in an important stockholders' suit involving Doeskin Products, Inc. (see *Waterman, et al.* v. *Johnston, et al.*, 85 N. Y. Supp. (2d) 462).

18. The transfer to Herbert of the Park Avenue property was without a present fair consideration and made solely with the intent to delay, hinder and defraud existing and subsequent creditors of Lowell and many of the corporations which he dominated and controlled, including Swan-Finch as a subsequent creditor."

POINT ONE

This application involves an exercise of discretion in appointing a receiver by the District Court approved by the Court of Appeals and with which this Court should not interfere.

Circuit courts have three times approved the appointment of receivers or fiscal agents of property claimed to be controlled by Lowell Birrell.

Ferguson v. *Bucks County Farms, Inc.*, 280 F. 2d 739 (3rd Cir. 1960);
Ferguson v. *Tabah*, 288 F. 2d 665 (2nd Cir. 1961);
Jakobson v. *Trustees of Swan-Finch Oil Corporation*, 313 F. 2d 140 (2nd Cir. 1963).

Since the appointment of a receiver involves an exercise of discretion, the handling of this bizarre case should be left to the judgment of the courts below which are by now abundantly familiar with the Birrell maneuvers.

POINT TWO

Having consented in open Court to a prompt hearing to avoid the effect of a motion to dismiss the appeal, petitioner cannot now be heard to criticize the Court for a summary disposition.

The Proceedings in the Court of Appeals and the Minutes of That Court

The petitioner, to thwart the receivership order and to prevent his ouster as managing agent, made a motion for a stay of the order appointing the receiver. These motion papers are part of the documents certified to this court. The motion was returnable January 14, 1963. The respondents made a cross-motion, returnable the same day, to

dismiss the appeal. These papers were *not* certified to this court and respondents have therefore included them in the appendix (at pp. 1a-19a). On the return day of these two motions before Circuit Judges Moore, Waterman and Medina, Presiding Judge Medina stated that the court was loath to dismiss any litigant's appeal, however meritorious the objection, and would prefer to hear the matter on the merits.

Counsel were asked by the Presiding Judge if they would be agreeable to return in the afternoon of the motion day and argue the matter fully on the merits. Both counsel consented. On the afternoon of that day the appeal was fully argued, the opening presentation being made at some length by the petitioner in this court (see Excerpts from Court of Appeals Minute Book (Appendix, p. 20a)).

Decision was reserved and counsel were thanked for their cooperation in assisting the court to dispose of the matter expeditiously. Two days later an affirming opinion was filed (see p. 22 of the petition). (The opinion is reported at 213 F. 2d 140.)

After consenting to this disposition in the petition for rehearing, it is also suggested (p. 3) "instead, a precipitous and summary method of judicial determination was utilized." If this be so, it was with the petitioner's consent, who cannot now be heard to complain.

Petitioner complains repeatedly that the Court of Appeals in dealing with this matter "directed argument of the appeal in this case without record, briefs or appendix" (p. 2). It is maintained there was a "summary disposition by a court of appeals * * *" (p. 4). It is stated (p. 7) "on the return of the motion, the court directed that the appeal itself be heard forthwith on the same day. The appeal was argued but no written briefs or other printed matter were ever submitted." One would think that the petitioner was a victim of horseback justice at Foley Square. At page 11

emphasis is again placed on "the summary nature of the proceedings * * * involving the argument of the appeal without briefs and on oral argument alone, * * *".

At page 12 under a separate point heading, "The court of appeals failed to afford proper review of the determination in the District Court."

Petitioner again complains of "The summary nature of the treatment of the appeal * * *". At page 13 it is stated, "The Court of Appeals, in its summary disposition, offered no guidance in this respect. In the interest of the administration of the bankruptcy laws in the federal courts and in the general interest of the adequate appellate supervision of district courts, certiorari should be granted."

In the light of the explanation of what actually transpired in the Court of Appeals, respondent submits the foregoing is an imposition on the Court.

POINT THREE

The demand for a bond is an afterthought raised in this Court for the first time and it should not be here considered. The claimed conflict among the circuits is therefore immaterial and will not be here discussed.

The request for a bond is not mentioned in any of the papers certified to this Court.

It is fundamental that a point not raised below will not be here considered.

Tyrrell v. *District of California*, 243 U. S. 1;
Duignan v. *U. S.*, 274 U. S. 195, 200;
Husty v. *U. S.*, 282 U. S. 694, 701;
California v. *Taylor*, 353 U. S. 553, 557, n. 2;
Lawn v. *U. S.*, 355 U. S. 339, 362, n. 16.

The point is not raised in the district court in the opposing affidavits; in the motion for a stay in the appellate court or in the petition for rehearing. It is therefore waived, assuming it has merit.

CONCLUSION

The petitioner has shown no reason in law or in fact which would justify this Court in granting his petition for certiorari and therefore the petition should be dismissed.

Respectfully submitted,

GEORGE C. LEVIN,
Counsel for Respondents,
745 Fifth Avenue,
New York 22, N. Y.

APPENDIX

Notice of Cross Motion to Dismiss Appeal and Supporting Papers

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket No. 27885

In the Matter of SWAN-FINCH OIL CORPORATION, KETA GAS AND OIL COMPANY, SWAN FINCH PETRO CHEMICAL CORPORATION, Debtors, by GEORGE C. LEVIN and JAMES V. HALLISEY, Trustees,

Petitioners-Appellees,

and

PETER JAKOBSON,

Respondent-Appellant.

PLEASE TAKE NOTICE that upon the annexed affidavit of James V. Hallisey, Esq., verified January 10, 1963, and the annexed affidavit of John F. Kelly, Esq., verified January 7, 1963, and upon all the papers and proceedings had heretofore, including order to show cause, dated October 22, 1962, together with supporting documents; opinion by Honorable Edmund L. Palmieri, District Judge, dated November 7, 1962; order entered November 30, 1962; order and memorandum, dated December 12, 1962, extending time to file the record on appeal; and order by Honorable Edward Weinfeld, District Judge, dated December 12, 1962, the undersigned will move this Court on the 14th day of January, 1963, at Room 1705, Federal Court House, Foley Square, New York City, at 10:30 A. M., or as soon thereafter as counsel may be heard, for an order dismissing the appeal herein on the ground that the appellant has no real

interest in the subject matter; he is not a party to the suit out of which the appeal arises; the cause has become moot as to the appellant; and it is wholly frivolous and taken for the purpose of delay, and for such other and further relief as the Court may deem just and proper.

Dated: New York, N. Y.
January 10, 1963.

GEORGE C. LEVIN and JAMES V. HALLISEY, Trustees,
Petitioners-Appellees,
745 Fifth Avenue,
New York 22, N. Y.

To:

ARTHUR D. EMIL, Esq.,
Attorney for Respondent-Appellant,
32 East 57th Street,
New York 22, N. Y.

JOHN F. KELLY, Esq.,
Receiver,
1780 Broadway,
New York 19, N. Y.

Affidavit of James V. Hallisey

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

[SAME TITLE]

STATE OF NEW YORK
COUNTY OF NEW YORK } ss.:

JAMES V. HALLISEY, being duly sworn, deposes and says that he is one of the Trustees for the above named debtor estates, the appellees in the above entitled action, and is fully familiar with all the facts and circumstances herein after set forth.

That deponent submits this affidavit:

(a) in opposition to the motion of the appellant for a stay pending his appeal, and

(b) in support of a motion for an order dismissing the appeal by the appellant Peter Jakobson.

APPELLANT'S STATUS

That this appellant has no standing to appeal. He is a mere agent and a subordinate of Herbert A. Birrell. His rights as agent are defined by a contract. Pursuant to its terms he has been discharged. He has no standing or status to appeal in this Court.

SUMMARY OF THE FACTS

The appellees claim the apartment building in question, which is located at 1050 Park Avenue, County of New York,

is owned by Lowell M. Birrell, and title is being held in the name of his brother Herbert A. Birrell with the intent to delay; hinder and defraud creditors of Lowell M. Birrell. The appellees are creditors of Lowell M. Birrell.

That since July 1962, the appellees have been attempting to serve a subpoena upon Herbert A. Birrell, who is a citizen of the United States and who resided at 1050 Park Avenue until some time in 1962.

That it was not until a hearing for the appointment of a receiver held on November 1, 1962, before Honorable Edmund L. Palmieri, District Judge, that the appellees learned from Herbert A. Birrell's attorneys, who appeared for him specially, that Herbert A. Birrell is now a permanent resident of Canada and has given up his residence in the United States. The appellees today do not know the exact whereabouts of Herbert, since his attorneys have only revealed the city and province in Canada in which he is purported to reside.

That Herbert A. Birrell is aware of the court proceedings that have been taking place with regard to the property he allegedly owns but refuses to put in an appearance to defend his position.

That at the hearing on November 1, 1962, mentioned above, Judge Palmieri suggested to Herbert A. Birrell's attorneys that the appellees meet *in Canada* with Herbert A. Birrell to discuss this matter. This was an attempt on the part of the District Judge to give the alleged owner of the property every effort to present his case, even at the expense of the appellees. This, too, Herbert A. Birrell refused to do.

That at the time of the hearing mentioned above Herbert A. Birrell had failed to pay the real estate taxes and the insurance premiums due on the building.

That Herbert A. Birrell is a lawyer licensed to practice in the State of New York, and Lowell M. Birrell was a

lawyer licensed to practice in New York State but was recently disbarred. Lowell is presently a fugitive from justice purportedly residing in Rio de Janeiro, Brazil. He was indicted in the then called New York State Court of General Sessions, New York County, charged with 69 counts of grand larceny in the first degree for fraudulently manipulating and embezzling securities and property of the appellees.

That in February 1962, for no apparent legitimate reason, Herbert A. Birrell obtained from Greenwich Savings Bank a mortgage on 1050 Park Avenue for $1,100,000. After paying approximately $450,000 to satisfy an already existing mortgage and paying certain expenses, he immediately secreted the balance by devious ways and means and no doubt has the money with him somewhere in Canada.

That the appellees presented all these facts to the District Court on the hearing for the appointment of the receiver. (See order to show cause dated October 22, 1962.) Herbert A. Birrell did not, and has not, contested any of the facts which were presented in the District Court and which facts stand admitted on this record.

That the appellant Peter Jakobson resides at 1050 Park Avenue. In March 1962 Herbert A. Birrell approached the appellant in an elevator of that building and asked Jakobson if he would like to become managing agent for the building. On March 31, 1962, Birrell leased the entire building *for five years* to Peter Jakobson. *The appellant gave absolutely no consideration for this lease.* The lease provides, among other things, that Jakobson is to pay certain expenses of maintaining the building, and after his charges the remaining income is to be remitted to Herbert's attorney, Paul Lindemann, at 342 Madison Avenue, New York, N. Y. This lease appears to have been executed for the sole purpose of taking the income from the building and routing it to Herbert A. Birrell in a complicated man-

ner. For the work that Peter Jakobson is to do under the lease, the arrangement was extremely profitable to him in that he was to receive $17,000 plus one-half of any rent increases for each tenant for the first year. Under the terms of the lease Herbert A. Birrell could cancel the lease *at any time* by giving 60 days' notice, plus making a payment of $5,000 to Jakobson.

That the receiver has given the appellant the 60-day notice provided for in the lease. The appellant would therefore be discharged as of February 1, 1963.

That the appellant is nothing but an agent of Herbert A. Birrell. The appellant's attorney admitted before Judge Palmieri that Jakobson was duped by Herbert A. Birrell and that the receiver could cancel the lease by complying with its terms.

That Herbert A. Birrell's attorneys, who appeared for him specially in the proceedings below, filed a notice of appeal on November 14, 1962, from the order appointing the receiver which was dated November 7, 1962. From the date the notice of appeal was filed to the date of this motion, 64 days have elapsed. Under Rule 14(a) of the Rules of the United States Court of Appeals for the Second Circuit, an appellant must docket the action and file the record in this Court within 40 days after filing the notice of appeal with the District Court.

That Herbert A. Birrell is attempting to use his agent to delay the administration of justice. He will not put in a personal appearance and is attempting to do indirectly what he dare not do directly.

That when Judge Palmieri, on December 18, 1962, granted the appellant an extension of time to file the record on appeal, he wrote a memorandum which reads:

> "The application has been granted to the extent of extending the time to file the record on appeal to January 10, 1963. However, this action has been

taken solely to allow the court sufficient time to scrutinize the order expected to be signed in the near future by Judge Weinfeld granting the Trustees' application made this date on consent of the defendant Peter Jakobson to discontinue the action as to him. Such order will probably render the instant application moot and remove the basis for any appeal by Jakobson. The Trustees may submit any answering affidavits if they are so advised."

Judge Weinfeld signed the order on December 27, 1962, on consent of the appellant.

COURT PROCEEDINGS

That in August, 1962 appellees commenced an action against Lowell M. Birrell, Herbert A. Birrell, Ruby Trading Corporation, Harry Casper and Peter Jakobson to set aside conveyances which appellees alleged were fraudulent.

That appellant Peter Jakobson was a party to that action as the lessee and agent of Herbert A. Birrell. Herbert could not be served personally because he fled to Canada where he took up permanent residence. Lowell M. Birrell could not be served personally because he is a fugitive from justice residing in Rio de Janeiro, Brazil. Lowell and Herbert Birrell were officers of Ruby Trading Corporation, and the present whereabouts of Ruby Trading cannot be determined.

That on October 22, 1962, appellees made application before Judge Palmieri, under whose supervision the reorganization proceedings of the debtor estates are being conducted, for the appointment of a receiver for the building located at 1050 Park Avenue. The appellant and Herbert A. Birrell's attorneys were served with copies of the application.

Affidavit of James Hallisey

That a hearing was held on November 1, 1962, at which Peter Jakobson appeared and Herbert A. Birrell's attorneys appeared for him specially.

That an order was signed by Judge Palmieri on November 7, 1962, appointing John F. Kelly, Esq., temporary receiver of the building.

That appellant objected to certain provisions contained in the order of November 7, 1962.

That on November 27, 1962, an application was made by the appellees to Judge Palmieri to modify the order of November 7, 1962, appointing the temporary receiver. Appellant Peter Jakobson appeared at the hearing and submitted papers. The application was granted. *Appellant's attorney prepared the order which was signed on November 30, 1962*, effective nunc pro tunc as of November 7, 1962. The appellant is attempting to appeal from an order which his own attorney prepared and which order was entered at his instance.

That the appellant has not made a motion to set aside the order appointing the receiver and has not made an application for a stay in the District Court. His motion for a stay and his appeal to this Court is solely to enable him to retain this highly lucrative lease arrangement.

That the appellant is attempting to prevent the court appointed receiver from performing his duties in accordance with the order signed by Judge Palmieri.

That on December 27, 1962, Judge Weinfeld signed an order on consent of appellant discontinuing Peter Jakobson as a defendant in the action bearing docket No. 62 Civ. 2890 which was commenced by the appellees against the Birrell brothers.

RELIEF

Appellees ask that the motion for a stay be denied because:

Affidavit of James Hallisey

1. It is a spurious attempt to delay the court-appointed receiver from performing his duties.

2. It is an attempt on the part of Herbert A. Birrell to use his agent to do his bidding, something which he dare not do himself while he continues to remain in Canada, immune to process, and with $500,000.00 in his possession.

3. The property in question is located at 1050 Park Avenue, County of New York, which is within the jurisdiction of the Federal District Court below. It is a well settled principle of law that a Federal Judge has discretion to appoint a temporary receiver if he believes one is needed, and this appointment can be upset by the Court of Appeals if the Federal District Judge has abused his right of discretion. In this case the alleged owner of the property has fled to Canada and will not return to defend himself: He is aware of the court proceedings taking place and would not meet with the appellees in Canada even at the suggestion of the District Judge. Therefore, on these facts, which were more fully presented to the Court below and which need not be here repeated, the appellant cannot possibly be successful on his appeal.

4. A receiver has the right to adopt or deny executory contracts which he finds in existence at the time of his appointment. The receiver in the instant case wishes to cancel the existing contract between Herbert A. Birrell and the appellant Peter Jakobson *by complying with the terms of the lease.*

Appellees ask that the appeal be dismissed because:

1. The appellant is but an agent of the purported owner of the property, and if the Court denies the stay he will not even be his agent after February 1, 1963.

Affidavit of James Hallisey

2. The appellant is no longer a party to the action below. The appellant consented to the discontiuance of the action as to himself upon the application of the appellees.

3. The appeal is wholly frivolous and taken for the purpose of delay, since appellant is appealing from an order which his counsel prepared.

4. If the appellant is allowed to go ahead with his appeal, there are only two questions which the Court of Appeals will have to pass on:

(a) jurisdiction of the subject matter and

(b) did the Federal District Judge abuse his discretion in appointing a receiver.

The answer to the first question is that the subject matter is a building located at 1050 Park Avenue, County of New York, and is within the jurisdiction of the Federal District Court below. With respect to the second question, the District Judge could not possibly have abused his discretion if the purported owner of the building fled to Canada, took up permanent residence there and has not put in a personal appearance to refute the allegations of the appellees. If the appellant is allowed to appeal, he will be put in the strange position of defending that about which he knows nothing. In attempting to demonstrate that the District Court abused its discretion in appointing the receiver, the appellant would have to refute the facts of the appellees. This the appellant cannot possibly do because he knows nothing of the matters involved. He is just an agent of Herbert A. Birrell as of March 31, 1962, and knows nothing of the intricate maneuvers of the Birrell brothers.

WHEREFORE, deponent respectfully requests that an order be made herein dismissing the appeal by the appellant

Peter Jakobson and that the stay which the appellant seeks be denied, and such other and further relief as to the Court may seem just and proper.

JAMES V. HALLISEY.

(Sworn to January 10, 1963.)

Affidavit of John F. Kelly

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

[SAME TITLE]

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

JOHN F. KELLY, being duly sworn, deposes and says:

I am the Temporary Receiver herein and I make this affidavit in opposition to the motion by Peter Jakobson, appellant herein, for an order staying deponent as Temporary Receiver from taking any action pursuant to the order of his appointment and in support of the cross-motion by the Trustees herein, dismissing the appeal herein filed by the appellant.

STATUS OF THE PARTIES

1. Deponent was appointed Temporary Receiver of the income and real estate of 1050 Park Avenue, by order entered herein in the District Court for the Southern Dis-

trict of New York on November 7th, 1962. Thereafter, on November 30th, 1962, a further order was made and entered herein in the said Court, which by its terms was effective nunc pro tunc as of November 7th, 1962. Both of these orders provided for the appointment of deponent as Temporary Receiver of the income and real estate of 1050 Park Avenue, and required deponent, as Receiver:

> "* * * to take possession of all of the said property, assets and effects, of whatsoever nature and wheresoever located, now owned by the said Herbert A. Birrell in connection with the premises known as 1050 Park Avenue New York City now owned by him or in his possession or in the possession of Peter Jakobson, or any agent, officer or representative of said Herbert A. Birrell or Peter Jakobson, together with any and all real estate and property pertaining thereto located at 1050 Park Avenue, New York City * * *."

2. Herbert A. Birrell appeared specially and filed a notice of Appeal on November 13, 1962, from the appointment of deponent as Temporary Receiver. However, he has failed to appear generally and has failed to docket and record the papers on appeal within the specified time.

3. Peter Jakobson is named the lessee in an alleged indenture of lease dated March 31st, 1962, covering the premises 1050 Park Avenue, in which lease Herbert A. Birrell is the named lessor. The said Peter Jakobson was originally named as a party defendant in an action commenced by the Trustees herein against Ruby Trading Corporation, Lowell A. Birrell, Herbert A. Birrell, Harry Casper and Peter Jakobson, 62 Civ. 2890. By order made and entered on December 27th, 1962, on the application by the Trustee and the consent of the attorney for the said

Peter Jakobson, an order was made and entered herein discontinuing the action as to the defendant, Peter Jakobson, without costs (Weinfeld J.).

BACKGROUND FOR AND PREPARATION OF AMENDED ORDER OF NOVEMBER 30TH, 1962

4. The moving affidavit of the attorney for the appellant (page 5) conveys the impression that the appellant was a stranger to the amended order and was further aggrieved by it. Nothing could be further from the truth.

5. Immediately after the appointment of deponent as Temporary Receiver for Herbert A. Birrell, deponent visited and examined the premises and conferred with the Trustees and with the appellant, Peter Jakobson, and his attorney, Arthur D. Emil, Esq., in order to become familiar with the subject matter and property for which deponent had been designated Temporary Receiver.

6. In these and subsequent conversations, Mr. Emil stated that he did not and could not have any valid objection to the appointment of deponent as Temporary Receiver, for Herbert A. Birrell, and he further conceded that deponent, as such Receiver, had all of the rights and obligations of Herbert A. Birrell under the aforementioned indenture of lease dated March 31st, 1962.

7. Mr. Emil, however, did object to certain language contained in the said order of November 7th, 1962, insofar as the same referred to his client, Peter Jakobson, and might conceivably adversely affect the rights of his said client, the appellant herein. Mr. Emil indicated that for this reason he filed the notice of appeal and notice of motion in this Court seeking an order staying the Temporary Re-

ceiver (his affidavit, page 4). Inasmuch as that part of the language of the order of November 7th, 1962 which Mr. Emil deemed objectionable was of no consequence to the function of deponent as Temporary Receiver, deponent and the Trustees herein, without conceding that such language was objectionable, nevertheless agreed to the entry of an amended order which would satisfy the objections raised by Mr. Emil as the attorney for the appellant, Peter Jakobson.

8. *Mr. Emil, the attorney for the appellant, Peter Jakobson, himself drew the new order which was made and entered herein November 30th, 1962 nunc pro tunc as of November 7th 1962.* He would now appeal from his own order and ask this Court to stay the actions of the Receiver in the performance of his designated duties, pending such appeal.

PROVISIONS OF LEASE BETWEEN HERBERT A. BIRRELL AS LESSOR AND PETER JAKOBSON, AS LESSEE

9. As in many parts of the moving papers, there are significant omissions of fact. The moving papers would create the impression that the Temporary Receiver had charged on to the scene and without any justification or authority had served notice of cancellation of the five year lease commencing on May 1st, 1962 and ending on April 30th, 1967, in which Mr. Jakobson is the lessee. Such impression is not correct.

10. The Temporary Receiver has at all times fully respected the lease. Deponent assumes, ad arguendo, that the appellant is a valid lessee, even though many aspects of the case have created a different impression as to the true role of Peter Jakobson.

11. The lease itself provides that either of the parties shall hav the right to cancel the lease by giving to the other party sixty days' notice in writing of his intentions so to do. The said provision of the lease is attached hereto, made part hereof and marked Exhibit "A".

ALLEGED UNLAWFUL ACT OF RECEIVER

12. After a careful examination of the property and the records thereof by the Temporary Receiver and his accountant, deponent, as Temporary Receiver, determined that the aforementioned indenture of lease dated March 31st, 1962 between Herbert A. Birrell, as lessor and Peter Jakobson, as lessee, was an undue burden on the said property and that in the interests of the preservation of the property for which deponent had been appointed the Temporary Receiver, the said indenture of lease should be terminated pursuant to the terms of the said lease since there could thus be accomplished an estimated annual savings of upwards of $20,000 to the estate for which deponent was appointed Temporary Receiver.

13. The amended order which had been prepared by Mr. Emil, the attorney for the appellant, Peter Jakobson, was made and entered herein on November 30th, 1962, nunc pro tunc as of November 7th, 1962. Immediately thereafter, and in strict compliance with the terms and provisions of the said indenture of lease, deponent, as Temporary Receiver, served upon Mr. Jakobson the required sixty day notice electing to terminate the said lease effective January 31st, 1963. A true copy of the said notice of termination is attached hereto, made part hereof and marked Exhibit "B".

14. It is well established that a Receiver may, under certain circumstances, refuse to adopt an existing contract

which he deems an undue burden on the estate. Deponent, as Temporary Receiver, has not availed himself of such privilege but has fully complied with all of the terms and provisions of the said indenture of lease, to the extent that the same are the obligations of the lessor. Deponent has done what Herbert A. Birrell was entitled to do under the terms and provisions of the said lease made with the appellant. If Mr. Jakobson is a victim, he is a victim only of his own agreement of March 31st, 1962. It is respectfully submitted that having determined that the aforementioned indenture of lease is an undue burden on the property for which he was appointed Temporary Receiver, deponent would have been remiss in his obligations as Temporary Receiver to act otherwise than he has done in this instance.

THE TERMINATION OF THE LEASE WILL NOT ADVERSELY AFFECT THE PREMISES

15. An examination of the premises and conversations with some tenants indicate that the premises have been operated in a rather ordinary fashion. Certainly, there is nothing unique about the present management of the premises.

16. Deponent, as Temporary Receiver, has surveyed the premises and interviewed the various employees at the premises in order to insure that there will be a continued operation and no termination of tenant services.

17. Insofar as the alleged negotiations for rent increases are concerned, again deponent respectfully submits that there is nothing unique about such services and deponent is fully prepared to exert every possible effort to the end that the maximum rent may be achieved from the premises.

18. The desperate effort by the appellant to remain in possession of the premises and his claim of substantial loss by reason of the termination of the lease, would seem to support the decision of the Receiver to terminate the lease, pursuant to the terms and provisions thereof, as an unnecessary burden on the estate for which deponent is Receiver.

APPELLANT'S MOTION FOR STAY SHOULD BE DENIED AND HIS APPEAL DISMISSED

19. To permit the appellant to continue with his appeal, would arrive at the unusual result of allowing Herbert A. Birrell the benefit of an appeal in an action in which he has not appeared or answered or submitted himself to the jurisdiction of the Court.

20. The appellant, having been severed from the proceedings by the order of discontinuance as to him, and to which he consented, has no basis to press the appeal. In the event he feels aggrieved by a wrongful act of the Receiver, then his remedy is in a proceeding in the District Court to be brought directly against the Receiver. However, since the Receiver has fully complied with all of the terms and provisions of the agreement of lease with the appellant, it would appear that the appellant would be hard put to establish any such claim.

21. It becomes patently clear that the purpose of the appellant in continuing with the litigation and appeal is to frustrate the appointment of the Receiver and to permit the appellant to continue in occupancy of the premises so that he can derive substantial profits from such operation.

22. Accordingly, deponent respectfully requests that the motion for a stay be denied and that the appeal of the

appellant be dismissed so that the Receiver may enter upon the performance of his duties and take possession of the premises on February 1st, 1963 and apply the profits of the operations to the estate for which he has been appointed Receiver.

JOHN F. KELLY.

(Sworn to January 7, 1963.)

Exhibit A

ARTICLE XV

1. Each of the parties hereto shall have the right to cancel this lease at the end of any month by giving to the other sixty (60) days' notice, in writing, of his intention so to do, in the manner hereinafter provided. In the event that this lease should be cancelled by the Lessor and if, the Lessee is not in default of any of his obligations under the terms and provisions of this lease on the effective date of such cancellation, the Lessor shall pay the sum of $5,000 to the Lessee upon the aforesaid accounting. Upon the delivery of such payment by the Lessor to the Lessee, the Lessor shall be released and discharged of all obligations under the terms and conditions of this lease in any manner whatsoever.

Exhibit B

KELLY AND SCHWARTZ
Counselors at Law

November 30th, 1962

Mr. Peter Jakobson
1050 Park Avenue
New York 28, New York.

Dear Mr. Jakobson:

Pursuant to the provisions of the indenture of lease dated March 31st, 1962, between Herbert A. Birrell, as lessor, and yourself as lessee, and particularly Article XV thereof, you are hereby notified that the undersigned, as temporary Receiver for Herbert A. Birrell, elects to cancel the said lease effective January 31st, 1963.

The foregoing is without prejudice to any rights of the undersigned as temporary Receiver for Herbert A. Birrell and is in no sense an admission as to the validity of the said instrument.

Very truly yours,

.....

John F. Kelly
Temporary Receiver for
Herbert A. Birrell

JK:ac

Court of Appeals—Excerpt from Minute Book

Monday January 14th, 1963

Motions before: MEDINA, WATERMAN, MOORE, C. J. J.

In re Swan-Finch—Stay

In re Swan-Finch—Dismiss

The argument of the appeal has been set for this afternoon, January 14th, 1963 at 4 P. M.

No. 260

In re Swan-Finch

ON APPEAL FROM THE U. S. DISTRICT COURT FOR THE SOUTHERN DISTRICT

ARTHUR EMIL, for Appellant,
GEORGE C. LEVIN, for Appellee.

Opinion of United States District Court, Southern District of New York

PALMIERI, *J.*:

PRELIMINARY STATEMENT

The trustees of Swan Finch move for an order restraining Lois B. Morrill from collecting or attempting to collect interest or amortization on two mortgages totaling approximately $900,000, held by her on the premises 1050 Park Avenue in New York City. Mrs. Morrill is the daughter of Herbert A. Birrell and a resident of Alexandria, Virginia.

At the commencement of the proceedings seeking to question her liens, Mrs. Morrill entered a special appearance. By consent of the parties, further proceedings were adjourned pending their attempt to arrange to their mutual satisfaction the manner in which the action should proceed. A temporary restraining order, enjoining the enforcement of the mortgages, and contained in the original order to show cause, was permitted to remain in effect, as Mrs. Morrill agreed not to press whatever objections she might have to it. Counsel stated that Mrs. Morrill would not appear in New York to be examined, but would consent to examination at her home. She also agreed to make available in New York certain documents relating to her mortgages. Thereafter, the trustees received access to several of the mortgage documents. Mrs. Morrill, however, now seeks to vacate the temporary restraining order.

The property in question has been the subject of much litigation in this court in the recent past, and, indeed, this motion can be understood only against the background of the other court proceedings which illuminate what is taking place and fix it in proper perspective. In November of 1962, this Court, upon application of the trustees, appointed a receiver for the property.[1] It was pointed out that the

[1] 213 F. Supp. 638 (S.D. N. Y. 1962).

evidence submitted by the trustees and, in particular, statements made to the trustees by Lowell Birrell's wife, Merrie, justified the strong suspicion that the property, although owned in name by Herbert Birrell, was actually controlled by his brother, Lowell, a fugitive from justice. The Court also noted that in December of 1961, in seeming response to threats of Merrie to divulge the above facts, Herbert Birrell had applied for and later received a mortgage of $1,100,000 on the property, of which approximately $600,000 had been deposited in various bank accounts here and in other jurisdictions. In most instances, the local accounts were closed out a short time after the money was deposited. This Court could ascertain no apparent business reason for mortgaging the property so heavily or for disposing of the funds in the manner indicated.

The Court of Appeals in a *per curiam* opinion of January 16, 1963,[2] affirmed the appointment of the receiver. A petition for rehearing was denied.[3]

It may be noted that Herbert Birrell, now claiming to be a bona fide resident of Canada, but until recently a resident of this District and the occupant of a penthouse in the property in question, refused to submit tot his Court's jurisdiction. He has not returned here since the commencement of the 1050 Park Avenue litigation, and has also consistently refused to submit to examination by the trustees. The appointment of the receiver has been vigorously contested in this court by Peter Jakobson, who was managing the property at the time of the appointment under a net lease from Herbert Birrell. The lease was later cancelled by the receiver pursuant to a sixty day cancellation clause con-

[2] 313 F. 2d 140 (2d Cir. 1963).

[3] The docket of the Court of Appeals indicates that the record in this case was certified by the Court of Appeals on April 4, 1963, at the request of the attorney for Peter Jakobson, to permit an appeal to the Supreme Court.

tained in it. Jakobson then sought to set aside the cancellation of his lease and the taking of possession by the receiver. This Court denied such application [4] and was affirmed by the Court of Appeals.[5]

Jakobson has also withheld from the receiver upwards of $30,000 in rents, and has refrained from paying various bills incurred by him during the period of his management of the building, apparently taking the position that he is not obligated to satisfy these debts. The refusal to pay these bills has confronted the receiver with a serious obstacle in the operation of the building. This Court, on March 8, 1963, was constrained to sign an order directing Jakobson to pay and discharge all obligations incurred by him for fuel, materials, supplies, work, labor and other services when he was in control of and managed the 1050 Park Avenue premises. An appeal has been taken by Jakobson with respect to this order and compliance with it suspended pending such appeal. The question of Jakobson's withholding of the rent collections remains to be settled.

Finally, and on March 7, 1963, Jakobson's attorney exhibited to the Court a document purporting to be an agreement of sale of the 1050 Park Avenue premises from Empire Associates, Inc. to Peter Jakobson Corporation. The agreement, executed in Ontario, Canada, on February 22, 1963, includes the signatures of both Peter Jakobson and Herbert Birrell, and recites that title had been conveyed to Empire from Herbert Birrell by deed dated January 14, 1963. Jakobson's attorney argued that the agreement gave Jakobson the status of a "contract vendee," thus enhancing his standing to litigate further with respect to the property. This Court enjoined the recording of the purported contract with the Register of the City of New York on the grounds

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[4] See Memorandum of this Court dated January 31, 1963.

[5] Affirmance by Judge Medina; January 31, 1963; no written opinion.

that the agreement was an attempt to circumvent the earlier orders of the Court by placing Jakobson in the position of litigating this matter for Herbert Birrell, while Birrell remained outside the jurisdiction and immune from inquiry as to the suspicious facts surrounding the title and operation of the property. Indeed, many of the actions taken by Jakobson appear to have been dictated by the position of Herbert Birrell, who has manifested a desire to litigate without risking the consequences of an appearance before the Court.

It is with these facts in mind that the rights of Lois Morrill must be evaluated. Mrs. Morrill is the daughter of a man who has engaged in several questionable transactions with respect to the preinises, who has refused to submit to the jurisdiction and processes of this court, and who has attempted, through the medium of a third party, to defeat its orders. There is on the record evidence of substantial financial transactions between Mrs. Morrill and her father relating to this property which makes it reasonable to assume that she is not outside the scope of his influence and his financial manipulations. For example, on February 27, 1962, the same date that Herbert Birrell received the $1,100,000 mortgage from the Greenwich Savings Bank, Mrs. Morrill executed an agreement with the bank to subordinate her mortgage liens to the new lien of the bank. In alleged consideration of her making such agreement, $40,000 of the proceeds of the $1,100,000 loan was paid to her at the direction of Herbert Birrell. This $40,000 was deposited in the First and Merchants National Bank of Richmond, Virginia, a city some miles distant from Mrs. Morrill's residence.[6] Similarly, at or about the same time,

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[6] See Petition of George C. Levin In Support of Application for Appointment of a Receiver, pp. 7-8, October 22, 1962; Proposed Findings of Fact and Conclusions of Law of Lois B. Morrill, pp. 5-6, April, 1963.

Mrs. Morrill agreed with her father to extend the time of payment of her mortgages until March, 1967, provided, however, that interest be paid to her until such date.[7]

These facts, in conjunction with the substantial doubts raised by the trustees with respect to the validity of the mortgages held by Mrs. Morrill, indicate that close scrutiny of these mortgages is in order. The status quo which is subject to immediate disruption by Mrs. Morrill must be maintained while this scrutiny proceeds to conclusion. Indeed, Mrs. Morrill apparently intends to foreclose her mortgages at the earliest possible moment, a step she can take through procuration and without appearing in this case.

There is thus ample reason for the granting of the preliminary injunction as the Findings of Fact and Conclusions of Law that follow are intended to demonstrate.

Findings of Fact

1. On November 7, 1962, John F. Kelly, Esq., was appointed temporary receiver of a fourteen-story apartment house located at 1050 Park Avenue, County of New York, City of New York.

2. The temporary receiver was appointed by the United States District Court for the Southern District of New York, Palmieri, J., upon the application of George C. Levin and James V. Hallisey, trustees of the above-named debtors in Chapter X reorganization proceedings, and pending the outcome of a plenary suit instituted by them.

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[7] See Proposed Findings of Fact and Conclusions of Law of Lois B. Morrill, p. 5, April, 1963. See also Rider "C," annexed to the Contract of Sale between Empire Associates, Inc. and Peter Jakobson Corporation, providing that as a condition of sale of the property and the purchaser's assumption of the Morrill mortgages, the seller is to obtain Mrs. Morrill's consent to a modification and extension of such mortgages.

3. Lois B. Morrill, who resides at 220 Croton Drive, Alexandria, Virginia, is the married daughter of Herbert A. Birrell and the niece of Lowell M. Birrell, who are defendants in the trustees' plenary suit. Herbert, a member of the New York Bar, now claims to be a resident of Canada. Lowell, who has been disbarred in this state, is a fugitive from justice.

4. In prior proceedings in this matter, it was established, and it has not been controverted, that Herbert Birrell obtained a new first mortgage on the property on February 27, 1962; that he has withdrawn all of his funds from his local bank accounts and those of his wife, Margaret K. Birrell, removing in an irregular fashion a minimum of $500,000, and possibly $600,000, from this jurisdiction; and that he has closed all local bank accounts and has refused to come forward and explain the whereabouts and disposition of this money. No valid business reason appears for the refinancing of this building or the siphoning of these funds to distant bank accounts.

5. All of Herbert Birrell's conduct indicates a deliberate plan and scheme to divest the property of any and all revenue, leaving inadequate funds available to meet the fixed charges of the building, which were deliberately increased by the new mortgage.

6. The receiver has conducted an investigation of the liens upon the said property and has found in the office of the City Register, County of New York, mortgages recorded against the property in the name of Lois B. Morrill in the total amount of $916,606.52.

7. One Paul Lindemann, Esq., who is the attorney for Mrs. Morrill's father, Herbert A. Birrell, informed the receiver by letter that the mortgages held by Lois B. Morrill were in the total amount of $481,129.53.

8. Lois B. Morrill states in her affidavit that she has two mortgages on the said property totaling $876,606.52.

9. The recorded mortgages demand interest in the amount of $3,853 to be paid on the first day of February, May, August and November, and interest in the amount of $2,422 to be paid on the first day of January, April, July and October.

10. Examination of the record discloses that the Troy Savings Bank of Troy, New York, had for years held a first mortgage on the premises. On February 27, 1962, the Greenwich Savings Bank issued check No. 1178 in the amount of $442,734.94 to the Troy Savings Bank in apparent discharge of the mortgage.

11. According to an assignment on record with the City Register at Liber 6035, page 93, the Troy Savings Bank assigned its mortgage to Lois B. Morrill of 220 Croton Drive, Alexandria, Virginia, in consideration for $435,476.99 paid by Herbert A. Birrell, owner of 1050 Park Avenue. It is believed that the difference in amounts between the check issued by the Greenwich Savings Bank and the assignment represents adjustments or the cost of anticipating payment. From the foregoing it would appear that no consideration whatsoever passed from Lois B. Morrill to the Troy Savings Bank for the assignment of the bank's interest in this mortgage.

12. Under ordinary practice, the bank's interest in this mortgage should have been satisfied and discharged rather than assigned. It appears, therefore, that the mortgage formerly in the name of the Troy Savings Bank has been put in the name of Lois B. Morrill, possibly creating a spurious and fraudulent lien against the property; or, at the very least, a questionable gift from Herbert Birrell which deserves further scrutiny.

13. Investigation by the receiver discloses that on August 5, 1961, Commercial Operating Corporation assigned its interest in a mortgage dated April 30, 1926 to Lois B. Morrill.

14. Commercial Operating Corporation was incorporated under the laws of the State of New York on November 5, 1942, by the law firm of Birrell & Birrell, 545 Fifth Avenue. It appears from the certificate of incorporation that the incorporators were the Birrells' legal secretaries. At the time of the assignment of the mortgage to her, Lois Morrill was president of Commercial Operating Corporation. The corporation was dissolved shortly after the assignment.

15. Irreparable harm would be occasioned through the institution by Lois B. Morrill of foreclosure or other proceedings to enforce her alleged rights in the premises. Such proceedings would further cloud the title and frustrate the investigation of the facts with respect to the ownership and operation of the property.

16. Irreparable harm would also be occasioned by the payment of interest or amortization to Lois Morrill. Peter Jakobson, the former net lessee of Herbert Birrell, has, with the apparent encouragement and assistance of the said Birrell, and under the guise of an agreement with him, withheld funds necessary to the operation of the building, has not paid valid and subsisting debts and apparently has no intention of paying such debts, and has attempted to frustrate the orders of this Court. Any and all present income is needed to enable the receiver to discharge valid obligations in connection with the property. Payment to Mrs. Morrill of such income, in these circumstances, cannot be justified as long as substantial doubt exists

with respect to the validity of her mortgages, and as long as such payment would jeopardize the rights and interests of innocent third parties and creditors.

CONCLUSIONS OF LAW

1. This Court has jurisdiction to issue the preliminary injunction sought by the trustees. Bankruptcy Act, § 2(a)(15), 11 U. S. C. § 11(a)(15); *Halpert* v. *Engine Air Service, Inc.*, 212 F. 2d 860, 863 (2d Cir. 1954); *In re Int'l Power Securities Corp.*, 170 F. 2d 399 (3d Cir. 1948). See generally, 1 Collier on Bankruptcy § 2.65, at 341 & n. 9 (14th ed. 1962).

2. The evidence before the Court raised substantial issues with respect to the involvement of Mrs. Morrill in suspicious financial manipulations surrounding the operation of 1050 Park Avenue. There is thus probable cause for the issuance of a preliminary injunction to prevent obstruction of and interference with the property pending further inquiry in a plenary suit. *Steelman* v. *All Continent Corp.*, 301 U. S. 278, 288 (1937).

3. The institution of proceedings by Mrs. Morrill to establish rights to the property will cause irreparable harm if not enjoined. See Finding of Fact No. 15.

4. The payment of income to Mrs. Morrill would impair the ability of the receiver to operate the building, and would deplete an asset in which Mrs. Morrill may eventually be adjudged to have no rights, to the detriment of innocent third parties and creditors. Such payments should not be continued pending an investigation of the validity of her liens. See Finding of Fact No. 16.

Opinion of United States District Court, Southern District of New York

5. The trustees' motion for a preliminary injunction is granted.

The trustees are directed to submit on notice an appropriate order in accordance with this opinion. The order should provide that the trustees are to commence, within a reasonable time of the filing of the order, an appropriate plenary action that will serve to present for a full trial the issues between Mrs. Morrill and the trustees. Mrs. Morrill may, within a reasonable time after the filing of such action, apply to this Court to have the preliminary injunction vacated, if the trustees have not proceeded with due diligence to secure a speedy trial for the issues in this case. *Platt & Munk Co.* v. *Republic Graphics, Inc.*, Nos. 27867, 27904, 2d Cir., March 21, 1963; *Steelman* v. *All Continent Corp.*, 301 U. S. 278, 290 (1937). The Court reserves decision on the question of whether security should be dispensed with in accordance with the authority of *Halpert* v. *Engine Air Service, Inc.*, 212 F. 2d 860 (2d Cir. 1954).

Dated: New York, N. Y.,
April 29, 1963.

EDMUND L. PALMIERI,
U. S. D. J.

Contract

THIS INDENTURE, made the 14th day of January, nineteen hundred and sixty-three.

BETWEEN HERBERT A. BIERELL, residing at c/o G. Yates, 32 James St. So. Hamilton, Ontario, Canada party of the first part and EMPIRE ASSOCIATES, INC., having its office at Suite 300, 545 Fifth Avenue, New York 17, New York party of the second part,

WITNESSETH, that the party of the first part, in consideration of Ten Dollars and other valuable consideration paid by the party of the second part, does hereby grant and release unto the party of the second part, the heirs or successors and assigns of the party of the second part forever,

ALL that certain plot, piece or parcel of land, with the buildings and improvements thereon erected, situate, lying and being in the Borough of Manhattan, City, County and State of New York, bounded and described as follows:

BEGINNING at the corner formed by the intersection of the southerly side of East 87th Street and the westerly side of Park Avenue; running thence westerly along said southerly side of 87th Street one hundred thirty-three (133) feet, four and one-quarter ($4\frac{1}{4}$) inches; thence southerly, parallel with Park Avenue, one hundred (100) feet, eight and one-half ($8\frac{1}{2}$) inches to the centre line of the block; thence easterly, parallel with the southerly side of 87th Street, one hundred thirty-three (133) feet, four and one-quarter ($4\frac{1}{4}$) inches to the westerly side of Park Avenue, and thence northerly along said westerly side of Park Avenue, one hundred (100) feet, eight and one-half ($8\frac{1}{2}$) inches to the point or place of beginning.

Contract

SAID premises being known as and by the street numbers 64, 72 and 74 East 87th Street, and 1050, 1052, 1054 and 1056 Park Avenue.

Subject to mortgages of record and interest thereon.

TOGETHER with all right, title and interest, if any, of the party of the first part in and to any streets and roads abutting the above described premises to the center lines thereof; TOGETHER with the appurtenances and all the estate and rights of the party of the first part in and to said premises; TO HAVE AND TO HOLD the premises herein granted unto the party of the second part, the heirs or successors and assigns of the party of the second part forever.

AND the party of the first part covenants that the party of the first part has not done or suffered anything whereby the said premises have been encumbered in any way whatever, except as aforesaid.

AND the party of the first part, in compliance with Section 13 of the Lien Law, covenants that the party of the first part will receive the consideration for this conveyance and will hold the right to receive such consideration as a trust fund to be applied first for the purpose of paying the cost of the improvement and will apply the same first to the payment of the cost of the improvement before using any part of the total of the same for any other purpose.

The word "party" shall be construed as if it read "parties" whenever the sense of this indenture so requires.

IN WITNESS WHEREOF, the party of the first part has duly executed this deed the day and year first above written.

In Presence of:

GEORGE YATES

HERBERT A. BIRRELL.

Contract

CANADA
PROVINCE OF ONTARIO } ss.:
COUNTY OF WENTWORTH

I, G. T. INCH, of the City of Hamilton, in the County of Wentworth, in the Province of Ontario, in the Dominion of Canada, Clerk of the County Court of the said County the said Court being a Court of Record having by law a seal.

Do hereby Certify as follows: GEORGE YATES, in the said Province, whose name is subscribed to the attached Instrument, was at the time of subscribing thereto, a Notary Public in and for the Province of Ontario, Canada duly commissioned and duly authorized by the laws thereof to administer oaths, to take affidavits and to certify the proof of deeds and other instruments in writ to be recorded within the said Province;

I have compared the signature of the said Notary Public subscribed to the attached Instrument with the specimen signature of the said Notary Public filed in this office and verily believe the said signature to be genuine; and

I have compared the impression of the seal on the attached Instrument with the specimen impression of the seal of the said Notary Public filed in this office and verily believe the said impression of the seal to be genuine.

IN TESTIMONY WHEREOF I have hereunto set my Hand and official seal at Hamilton, this 14th day of January, 1963.

G. T. INCH, D. B.,
(G. T. Inch), Clerk, County Court,
County of Wentworth.

[SEAL]

On the day of January 1963, before me personally came HERBERT A. BIRRELL, to me known to be the individual described in and who executed the foregoing instrument, and acknowledged that he executed the same.

A Notary Public in and for the Province of Ontario.
My Commission expires at Her Majesty's Pleasure.

Letter, Dated March 7, 1963

ARTHUR D. EMIL
Attorney at Law

LAWRENCE A. KOBRIN
LOREN A. WITTNER

32 East 57 Street, New York 22
MUrray Hill 8-6040
Cable Address Ademillaw

March 7, 1963

George C. Levin, Esq. and
James V. Hallisey, Esq.,
Trustees
745 Fifth Avenue
New York 22, New York

John F. Kelly, Esq.,
Temporary Receiver
1780 Broadway
New York, New York

Gentlemen:

I represent Peter Jakobson Corporation. This is to advise you that said corporation has executed a contract dated February 22, 1963 with Empire Associates, Inc. for the purchase of premises 1050 Park Avenue. In accordance with the provisions of Paragraph 2 of Rider B of said contract, I enclose herewith a photostatic copy of said contract.

The Peter Jakobson Corporation will take all steps necessary to assist in the determination of the true ownership of 1050 Park Avenue so that it may enforce its contract.

Very truly yours,

A. D. EMIL

ADE:ge
Enclosure
Hand Delivery